Supreme Court, U. S.
FILED
AUG 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

76-273

No. A-84

AUSTIN L. DAVIS,

versus

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. A-84

IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

AUSTIN L. DAVIS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * * * * * * *

PETITION

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES OF AMERICA:

JURISDICTION

Jurisdiction of this matter lies in this Court based on the following:

1. On the 2nd day of June, 1976, the United States Court of Appeals for the Fifth Circuit affirmed a decision

of the United States District Court for the Southern District of Texas. The affirmation entered was by Local Rule 21 decision.

2. On the 25th day of June, 1976, the United States Court of Appeals for the Fifth Circuit on a Petition for Rehearing denied the Petition of Austin L. Davis.

3. On the 30th day of July, 1976, the Honorable Lewis F. Powell, Jr. entered an Order extending time to file this Petition for Writ of Certiorari to and including the 24th day of August, 1976.

4. Jurisdiction is conferred on this Court by Article III, Section 1, of the Constitution of the United States and 28 USC 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether or not the Circuit Court erred in failing to grant Petitioner a

new trial based on the Trial Court's refusal to allow him an opportunity to present a defense before the Trial Court found him guilty of possession of marijuana.

STATEMENT OF THE CASE

This action involved an appeal from a Judgment of the Federal District Court of the Southern District of Texas, sitting at Brownsville, Texas, finding Petitioner guilty of Count II of the Indictment in cause number CR. No. 75-B-152 filed in the District Court on April 23, 1975. Count II of the Indictment alleged, in substance, that on or about January 12, 1975, the Petitioner, Austin L. Davis, did knowingly and intentionally, possess, with intent to distribute a quantity of marijuana in violation of Title 21, United States Code, Section 841(A)(1).

Prior to trial, Defendant-Petitioner, Davis, timely filed his Motion to Suppress the Evidence, Motion to Disclose the Identity of the Informer, and Amended Motion to Suppress the Evidence. Petitioner's original Motion to Suppress was heard and denied on June 9, 1975, and the Motion to Disclose the Identity of the Informer was carried along with the case. Petitioner's Amended Motion to Suppress was heard and denied on August 11, 1975. On August 11, 1975, the Petitioner waived Trial by jury and proceeded to Trial before the Court on Count II of the Indictment only. The Court denied Petitioner's Motion to Disclose Identity of Informer. Upon the conclusion of the Government's evidence, Petitioner, Davis, moved for acquittal which the Court denied and made its finding of guilty as to the Petitioner, Davis; without

giving him an opportunity to present any defense.

On September 19, 1975, the Petitioner was sentenced to two years to serve and special parole term of two years.

STATEMENT OF THE FACTS

On or about January 10, 1975, Special Agent Kenneth E. Moore with the Drug Enforcement Administration in McAllen, Texas, received a phone call from a confidential informant (S.R.96). Agent Moore spoke to the informant on the phone and later met with the informant (S.R. 101-102). The information given by the informant was: that there was a man named Jeffry Lloyd staying at the La Posada Motel in McAllen, Texas, he had two rent cars in his possession;

NOTE: For the purpose of this Petition, S.R. refers to the Supplemental Record page number and R. refers to the page in the original record.

he, (Mr. Lloyd) was in town to do a narcotics transaction and that he would be taking the marijuana back to Florida (S.R. 97). Agent Moore was not given any information showing the basis of the Informant's conclusion that Mr. Lloyd was in town to buy marijuana (S.R. 99-100). The informant also gave the color, type and license plates of the rent cars and said that there would be a third car involved which would probably be used to take the marijuana out of state (S.R. 101). The informant did not relate how he acquired the information concerning the cars (S.R. 101). Agent Moore related the information that he obtained from the informant to Special Agent Victor Mason (S.R. 15).

Based upon the foregoing information, and nothing more, the agents began surveillance (S.R. 24) which continued

from Friday afternoon, January 10 to 2:00 P.M. January 11, 1975 (S.R. 76). During the course of the surveillance, the agents located and watched two of the rent cars, (S.R. 25-26) and verified that Mr. Lloyd was staying at the La Posada Motel and there were two other persons staying with him (S.R. 81). During the course of the surveillance, the D.E.A. Agents did not observe any activity to lead them to believe Mr. Lloyd was involved in the commission of any offense (S.R. 29).

The arresting Agent, Victor Mason, testified that the sole basis for probable cause to stop, arrest, and search Mr. Lloyd's vehicle was the information provided by the informant and that which has been outlined above plus the fact that the third rental car was located on January 12, 1975, parked near the

La Posada Motel and it appeared located in the back, which was the only additional information Mr. Mason had at the time of arrest which he did not have when surveillance was cut off on January 11, 1975 (S.R. 82, 85, 86). Although the arresting agent said he smelled marijuana, it was after he had made the arrest of Mr. Lloyd and formulated his intent to search the vehicle (S.R. 87). Agent Moore testified that the informant did not give any information that the car contained marijuana, (R. 41-42-Page 22-23 of Pretrial hearing of June 9, 1975), but that they, (the agents) were curious and if Mr. Lloyd had not come to the car at that time, they would have set up another surveillance and tried again. (R. 48-49-Page 29-30 of Pretrial hearing of June 9, 1975).

After the arrest and search and seizure of Mr. Lloyd and the vehicle he

was in, the agents took Mr. Lloyd back to his hotel room (S.R. 178).

The Defendants, Davis, Coley, Garza and Pena, were in the room (S.R. 178). The Agents searched the room and found three (3) guns; one near the bed, and two in the closet (S.R. 183 and 187), airline tickets, Thirteen Thousand Five Hundred Dollars ($13,500.00) in a bag (S.R. 188), a brown paper bag with a phone number and what appeared to one of the agents to be a map of the McAllen-Mission area, (S.R. 192) and an address directory (S.R. 193). Davis and the other Defendants were arrested and charged as in the indictment.

All arrests, searches and seizures were without arrest or search warrants.

ARGUMENT AND AUTHORITIES

Upon the trial of this case before the Court, the Petitioner, Davis, made

his motion for acquittal of the charge against him after the government had rested its case (S.R. 230-243) and before the defense was given any opportunity to open. After hearing the Petitioner's motion for acquittal, the Court announced its finding that the Petitioner was guilty of the offense charged in the indictment (S.R. 243-244). The Petitioner was not given an opportunity to present any evidence or defense of himself at the trial of the case. Therefore, the Petitioner, Davis, was convicted of the offense in violation of the most fundamental rights of a Defendant to present a defense in his own behalf in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Also, the Court violated the specific provisions of Rule 29 of the Federal Rules of Criminal

Procedure which provides that, upon the close of the government's case, the Defendant may move for acquittal and, if hereafter denied by the Court, may offer evidence in his own behalf.

Therefore, because the Petitioner was denied his right to an opportunity to present his defense before the fact finder made its determination of guilt, the conviction of this Petitioner should be reviewed.

CONCLUSION

Wherefore, Petitioner prays this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit so this matter may be fully reviewed and Petitioner's rights fully protected.

MICHAEL D. MARTIN
Post Office Box 117
Lakeland, FL 33802

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U. S. Mail this the 23rd day of August, 1976, to Assistant U.S. Attorney, James Gough, Jr., Post Office Box 61129, Houston, Texas; and Robert H. Bork, Department of Justice, Constitution Avenue between 9th and 10th Streets, Washington, D.C. 20530.

MICHAEL D. MARTIN

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75-3750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUSTIN L. DAVIS, and
ROBERTO GUADALUPE GARZA,

Defendants-Appellants.

Appeals from the United States District Court for the

SOUTHERN DISTRICT OF TEXAS

(June 2, 1976)

Before Wisdom and Morgan, Circuit Judges, and Lynne, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Issued as Mandate: JUL 6 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JUN 25 1976
EDWARD W. WADSWORTH
CLERK

No. 75-3750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUSTIN L. DAVIS and ROBERTO GUADALUPE GARZA,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the Southern District of Texas

- - - - -

ON PETITIONS FOR REHEARING

(June 25, , 1976)

Before MORGAN, Circuit Judge, and LYNNE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

*Judge Wisdom was a member of the original panel but because of illness did not participate in this decision.

Form 703-3

Supreme Court of the United States

No. A-84

AUSTIN L. DAVIS,

Petitioner

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 24, 1976.

/S/ Lewis F. Powell
Associate Justice of the Supreme Court of the United States

Dated this 30th day of July, 1976.

Supreme Court, U. S.
FILED
JAN 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-273

In the Supreme Court of the United States

OCTOBER TERM, 1976

AUSTIN L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-273

AUSTIN L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was not given an opportunity to present a defense at trial.

Following a nonjury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, to be followed by a special parole term of two years. The court of appeals affirmed without opinion (Pet. App. 1).

1. On January 10, 1975, federal agents received information from an informant that one Jeffrey Lloyd had journeyed from Florida to the McAllen, Texas, area in order to purchase marijuana. According to the informant, Lloyd was staying at the LaPosada Motor Hotel and had rented two automobiles, both of which the informant

described (App. Br. 3).[1] Following this lead, the agents learned that Lloyd had rented two rooms at the motel, in which he was registered with two other persons, and had rented three vehicles, one of which was special ordered to be used for out-of-state travel (App. Br. 3-4).

Two days later, the informant told the agents that one of the rented cars was parked in front of a bus station located near the motel and that the car appeared to be loaded, since it was riding low in the rear. The agents went to the bus station and located the automobile, which they determined appeared to be heavily loaded (App. Br. 4). Shortly after the agents arrived at the station, Lloyd appeared; he drove the car a short distance before he was stopped by agents. The agents searched the vehicle and found approximately 300 pounds of marijuana in the trunk. Lloyd was arrested and informed of his constitutional rights (App. Br. 5).

The agents then went to the motel with Lloyd to collect the latter's personal belongings. Lloyd told the agents that there were others waiting in the room who were probably armed, and he offered to enter first to prevent violence (App. Br. 5). When Lloyd and an agent entered, petitioner and several other men were in the room. The agent arrested petitioner and the others present in the room. The agents found three firearms, one in plain view, and a large sum of cash in the motel room (App. Br. 5-6).

Petitioner was tried before a judge without jury.

At the conclusion of the government's case, the court entertained motions for judgments of acquittal on behalf

[1]The government's brief in the court of appeals (App. Br.) sets forth the memorandum and order of the district court, ruling on Davis' motion to suppress evidence. A copy of this brief has been lodged with the Court.

of several defendants; in denying those motions, the court ruled on the merits of the case and entered judgments of conviction against petitioner and two co-defendants. A third co-defendant was acquitted.

2. Petitioner's contention that he was deprived of an opportunity to present a defense is not supported by the record.

The defense did not indicate at any point that it had witnesses whom it wished to call on petitioner's behalf. (See, *e.g.*, discussion concerning presence of witnesses and swearing of witnesses, Tr. 1-6).[2] Defense counsel, when asked if he wished to make an opening statement, gave no indication that he planned to present evidence on behalf of petitioner. Instead, he stated (Tr. 161): "We really have no opening statement."

The government presented its evidence, to which defense counsel raised objections on a number of occasions. The defense had previously lost a motion to suppress the fruits of the arrest and searches. After the government presented its evidence, petitioner's counsel moved for a judgment of acquittal on the ground that no showing had been made by the government of actual or constructive possession of the marijuana (Tr. 231). Petitioner's counsel presented argument in support of this motion. The trial court inquired of the other attorneys if they wished to speak (Tr. 234, 235, 238), and then asked if "anybody else want[ed] to say anything" (Tr. 241). Two counsel, including petitioner's counsel, responded

[2]"Tr." refers to the transcript of petitioner's trial in the district court on August 11, 1975.

with further argument concerning the inferences that could properly be drawn from the government's evidence. Petitioner's counsel reviewed the facts presented by the government and stated that they did not show actual or constructive possession of marijuana by the defendants. This argument was heard out by the trial court (Tr. 241-243). The court then found petitioner and two other co-defendants guilty as charged (Tr. 243-244).

Under the circumstances, the court had every reason to believe that the case was ready for decision after argument on the motion for judgment of acquittal.[3] The record indicates that petitioner's counsel at no time indicated that he wished to introduce evidence on petitioner's behalf; it also clearly shows that petitioner had ample opportunity to present and did present arguments concerning the strength of the government's case. Further, counsel for petitioner did not object after the ruling by the trial court, move to reopen, or in any other way signify that he wished to present evidence or make any further argument. Petitioner therefore cannot now complain that he was denied an opportunity to present a defense. In any event, petitioner has made no showing before the court of appeals or this Court of additional evidence or other defensive matter that he wished to raise at trial; there is therefore no indication that he suffered any prejudice.

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[3]Of course defendants may decline to introduce evidence on their own behalf, choosing instead to argue that the government has not met its burden of proving guilt beyond a reasonable doubt. Petitioner's counsel appears to have chosen this approach in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JANUARY 1977.